# STATE OF MICHIGAN

# COURT OF APPEALS

MICHAEL UPTERGROVE,

Plaintiff-Appellant,

v

JANET NACU,

Defendant-Appellee.

UNPUBLISHED
August 20, 2002

No. 230329
Washtenaw Circuit Court
LC No. 99-005374-NO

Before: Zahra, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition for defendant in this premises liability case. We affirm.

Plaintiff is an electrical contractor who was hired to help with the remodeling of defendant's kitchen. On December 5, 1997, plaintiff and two employees arrived at defendant's home to install phone lines and repair a circuit. The ground was covered with snow, but it was not snowing at the time.

In the course of his work, plaintiff found it necessary to access the home's crawl space. Plaintiff exited the house, walked across defendant's back patio toward the crawl space, and slipped and fell on the patio. Plaintiff suffered a broken leg as a result of the fall. Plaintiff brought the instant action, alleging defendant was negligent in failing to properly clear the snow and ice from the patio and failing to warn him of the patio's slippery condition. Defendant brought a motion for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that plaintiff's claim failed because the undisputed facts established defendant had no notice that plaintiff would be traversing the patio and the danger associated with the patio was open and obvious. The trial court granted summary disposition for defendant.

On appeal, plaintiff first argues that the trial court's order granting summary disposition must be reversed because the court did not specify whether the motion was granted under MCR 2.116(C)(8) or (C)(10). We disagree. A review of the record establishes that defendant and the trial court relied on documentary evidence outside of the pleadings to support the motion. Therefore, notwithstanding that the court did not specify the subsection on which it relied, we consider the motion as granted under (C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331,

338 n 9; 572 NW2d 201 (1998); *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997); *Shirilla v Detroit*, 208 Mich App 434, 436-437; 528 NW2d 763 (1995).[1]

Plaintiff also argues that the trial court erred in granting summary disposition for defendant because there are disputed issues of fact in regard to whether the circumstances required defendant to inspect and clear the patio and to warn plaintiff of its dangerous condition. We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). All reasonable inferences are resolved in the nonmoving party's favor. *Hampton v Waste Mgt of MI, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

Generally, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). That duty involves inspecting the premises and making any necessary repairs or warning of discovered hazards. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). The duty does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers that are known to an invitee or so obvious that an invitee can be expected to discover them himself. *Lugo, supra*, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). An "open and obvious" danger is one that a person of ordinary intelligence would discover upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). However, even in the event that the danger is open and obvious, if "special aspects" of a condition make an open and obvious risk unreasonably dangerous, the possessor has a duty to take reasonable precautions to protect invitees from the risk. *Lugo, supra* at 517, citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995).

Here, plaintiff testified that prior to crossing the patio, he noticed it was covered with a light dusting of snow. Plaintiff stated that he was familiar with Michigan winters and acknowledged that he could not see whether there was ice underneath the snow. Plaintiff testified that he knew there was concrete underneath the snow. Under these circumstances, the danger of slipping on the patio was open and obvious to a person of ordinary intelligence. *Novotney, supra*. See *Perkoviq v Delcor Homes – Lake Shore Pointe, LTD*, 466 Mich 11, 16; 643 NW2d 212 (2002), *Corey v Davenport College of Business*, __ Mich App __; __ NW2d __ (Docket No. 206185, issued 4/26/02), slip op p 4, and *Joyce v Rubin*, 249 Mich App 231, 239; 642 NW2d 360 (2002). Consequently, defendant owed no duty to plaintiff with respect to the slippery condition of the patio. *Lugo, supra* at 516. Plaintiff does not argue that any special aspects made the open and obvious risk unreasonably dangerous. We have found no special

[1] Given that defendant's motion was not granted under MCR 2.116(C)(8), we need not consider plaintiff's second issue on appeal, which focuses solely on whether summary disposition was proper under (C)(8).

aspects in this case and, therefore, conclude that summary disposition was proper based on the open and obvious nature of the hazard. *Id*. at 517.[2]

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Kathleen Jansen

[2] Given our conclusion, we need not consider whether summary disposition was also proper based on defendant's alleged lack of notice that plaintiff would traverse her back patio.